

FROM

(MON) 7.30' 01 11:06/ST. 11:00/NO. 4261720228 P 5

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI, OHIO

EPA Region 5 Records Ctr.



275567

THE DOW CHEMICAL COMPANY, et al.,

Plaintiffs,

v.

ACME WRECKING CO., INC., et al.,

Defendants.

Civil Action Nos.

C-1-97-0307 and C-1-97-0308

(Consolidated Actions)

Judge Weber

THE DOW CHEMICAL COMPANY, et al.,

Plaintiffs,

v.

SUN OIL COMPANY d/b/a SUNOCO OIL
CORP., et al.,

Defendants.

**MEMORANDUM IN SUPPORT OF MOTION OF PLAINTIFFS
THE DOW CHEMICAL COMPANY, FORD MOTOR COMPANY,
GE AIRCRAFT ENGINES, AND VELSICOL CHEMICAL CORPORATION
TO DISMISS CLAIMS AGAINST CERTAIN DEFENDANTS AND
MOTION OF MORTON INTERNATIONAL, INC. AND PPG INDUSTRIES, INC.
TO DISMISS AND FOR WITHDRAWAL**

Pursuant to this Court's First Case Management Order ("CMO"), entered August 26, 1997, the parties have been participating in a non-binding alternative dispute resolution process ("ADR process"). As a result of that process, the Plaintiffs and certain defendants named in Plaintiffs' First Amended Complaint, filed September 12, 1997,¹ entered into the Skinner

¹In that complaint, Plaintiffs sought cost recovery pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, contribution pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), declaratory

Landfill Site Work Group Participation Agreement ("Work Group Agreement") to resolve their liability with respect to one another and to fund and conduct the Remedial Action at the Skinner Landfill Site (the "Site"). Pursuant to the Work Group Agreement, Plaintiffs Morton International, Inc. ("Morton"), a wholly-owned subsidiary of Rohm & Haas, and PPG Industries, Inc. ("PPG") agreed to dismiss with prejudice their claims in Plaintiffs' First Amended Complaint for response costs incurred or to be incurred at or in connection with the Site, upon the entry of a consent decree including Morton and PPG as settling *de minimis* parties.²

As a further result of the ADR process and subsequent negotiations with the United States, Plaintiffs, certain defendants, and certain other parties that were identified during the ADR process entered into one of two consent decrees with the United States (the "Remedial Action Consent Decree" or the "Municipal Consent Decree"). These decrees were lodged in this Court by the United States on May 26, 2000, together with a complaint seeking recovery of the government's past and future Site response costs, and entered by the Court on April 3, 2001. The consent decrees resolve most of the claims of the settlors against one another with respect to response actions taken or to be taken in connection with the Skinner Landfill Site, and the payment of response costs incurred or to be incurred at or in connection with the Site. See Remedial Action Consent Decree ¶ IV.4.; Municipal Consent Decree ¶ V.4.³ The Remedial Action Consent Decree includes both Morton and PPG as settling *de minimis* parties.

relief pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), equitable restitution, and equitable contribution.

²In that agreement, Morton and PPG expressly reserved their right to bring future contribution or cost recovery claims for claims asserted by the State of Ohio or federal natural resource trustees for response costs or natural resource damages and assessments at or in connection with the Site.

³The parties expressly reserved the right to pursue claims against one another for matters not addressed in the consent decrees, including, for example, contribution claims in the event any claim is asserted by the State of Ohio with respect to the Site and claims for natural resource damages. See, e.g., Remedial Action Consent Decree ¶¶ XXIX. 134. - 135.

Accordingly, Morton and PPG move for the dismissal with prejudice of all their claims in this case, and seek to withdraw as plaintiffs.⁴

Additionally, under the terms of the Work Group Agreement, the remaining Plaintiff Work Group Members (The Dow Chemical Company; Ford Motor Company; GE Aircraft Engines; and Velsicol Chemical Corporation, hereinafter collectively referred to as the "Remaining Plaintiffs") agreed to dismiss their claims against the defendant Work Group Members and related parties.⁵ This group includes the following defendants:

Anchor Hocking Corporation;
Canadian OXY Offshore Production Company;
Chemical Leaman Tank Lines, Inc.;
Columbian Chemicals Company;
Formica Corporation;
General Motors Corporation;
Glenn Springs Holdings, Inc.;
Henkel Corporation;
King Container;
King Container Services, Inc. (King Container Services Company, Inc.);
King Wrecking;
Millennium Petrochemicals, Inc.;
Monsanto Company;
Newell Co. (aka Newell Rubbermaid, Inc.);
OXY, USA, Inc.; and
Quantum Chemical Corporation, f/k/a National Distillers & Chemicals Corp.

Because several of these defendants may seek soon to pursue claims against remaining nonsettling defendants that are similar and related to those of the Remaining Plaintiffs, it would

⁴The parties were ordered to participate in the ADR process prior to the service of any responsive pleadings by the defendants to Plaintiffs' First Amended Complaint. Accordingly, there are no outstanding counterclaims or cross-claims against Morton and/or PPG that would preclude their withdrawal from the case. One defendant, Champion International Corporation, filed counterclaims in response to the initial Complaint, but was ordered to participate in ADR prior to filing any pleading responsive to the First Amended Complaint. In any event, Champion's counterclaim is barred by ¶¶ XXIX.141. and XXX.144. of the Remedial Action Consent Decree.

⁵Like Morton and PPG, the Remaining Plaintiffs expressly reserved claims relating to claims asserted by the State of Ohio or any federal natural resource trustee for response costs or natural resource damages or assessments at or in connection with the Site. See also Remedial Action Consent Decree ¶ XXIX.135.

conserve resources if those parties who decide to proceed with such claims are realigned as plaintiffs in this action, rather than being dismissed as defendants here and compelled to file their own complaints against those nonsettlers, and to then seek to have all those actions consolidated with this one. See, e.g., U.S. Fidelity & Guaranty Co., et al. v. Thomas Solvent Co., et al., 955 F.2d 1085, 1089 (6th Cir. 1992) (parties are to be aligned in accordance with the primary dispute in the controversy, even where a different, legitimate dispute between the parties supports the original alignment). As such, counsel for the Work Group defendants have represented to Plaintiffs' counsel that they would prefer to remain in this action until they decide whether to pursue their claims against the nonsettlers.

The Work Group defendants expect to be able to decide whether to pursue those claims by or near the end of August 2001 (and based, in part, upon the results of ongoing settlement discussions among the Work Group, the United States, and the nonsettlers). At that time, Plaintiffs will dismiss from this action those Work Group defendants who decide not to pursue those claims.

Under the terms of the Remedial Action Consent Decree, Plaintiffs agreed to move for the dismissal with prejudice of their claims against defendants that entered into and fulfilled their obligations under a *de minimis* settlement with the United States, as memorialized in that decree. See Remedial Action Consent Decree ¶ XXIX.141. Accordingly, Remaining Plaintiffs move for dismissal with prejudice of their claims against the following defendants that entered into, and have fulfilled their obligations to Plaintiffs under, the Remedial Action Consent Decree:

American Premier Underwriters, Inc.;
American Standard, Inc.;
The Andrew Jergens Company;
Avon Products, Inc.;
The B.F. Goodrich Company;
Borden, Inc.;
BP America, Inc.;
Browning-Ferris Industries of Ohio, Inc.;
Butler County;
Champion International Corporation;
The Cincinnati Enquirer;
The C.M. Paula Company;
Consolidated Rail Corporation;

Cytec Industries, Inc.;
E.I. DuPont de Nemours and Company;
City of Fairfield;
Georgia-Pacific Corporation;
Village of Glendale;
Globe Valve Company;
Hilton Davis Company;
International Paper Corporation aka Masonite Corporation;
Johnston Coca-Cola Bottling Group, Inc.;
Mecco, Inc.;
City of Montgomery;
MVM, Inc.;
Newberry Construction Company;
The Procter and Gamble Co.;
Queen City Barrel Company;
Ralcorp Holdings, Inc.;
City of Reading;
Rumpke Sanitary Landfill;
Rumpke Waste Collection & Disposal Systems;
Rumpke Collection & Disposal System;
Shell Chemical Co.;
Shell Oil Co.;
City of Silverton;
Steelcraft Manufacturing Company;
Sun Oil Co. d/b/a Sunoco Oil Corporation;
Texaco, Inc.;
Union Carbide Corporation; and
Watsons's/J&J Distributing Co.

Plaintiffs also agreed to move for the dismissal of their claims against municipal defendants that entered into, and fulfilled their obligations to the Skinner Landfill Special Account under, a settlement with the United States pursuant to the Municipal Solid Waste Policy of the U.S. Environmental Protection Agency ("EPA"). See id. ¶ XXIX.142. Remaining Plaintiffs accordingly move as well for dismissal with prejudice of their claims against the following municipal defendants that entered into, and according to EPA have fulfilled their obligations under, the Municipal Consent Decree:

City of Blue Ash;
City of Deer Park;
Village of Lincoln Heights;
City of Mason;
City of Madeira;
Municipality of Monroe; and
City of Sharonville.

Counsel for Elsa Skinner-Morgan, the owner and operator of the Site and a party to the Remedial Action Consent Decree, has represented that his client has fulfilled her obligation under that decree to submit to EPA for review and approval a notice to be filed with the Recorder's Office, Butler County, State of Ohio, which is to provide notice to all successors-in-title that (i) property owned by Ms. Skinner-Morgan is part of the Skinner Landfill Site, (ii) EPA selected a remedy for the Site on June 4, 1993, (iii) potentially responsible parties have entered into a consent decree requiring implementation of that remedy, and (iv) an option was granted to OXY USA to purchase the Site. See id. ¶ XI.34. Remaining ongoing obligations of Ms. Skinner-Morgan under that decree can be addressed, if necessary, through the Court's continuing jurisdiction over the decree. Accordingly, Remaining Plaintiffs also move for dismissal with prejudice of their claims against Elsa Skinner-Morgan.⁶

The federal defendants are parties to the Remedial Action Consent Decree but have not yet fulfilled their obligation to pay the amount listed in Column A of Appendix F to the Skinner Landfill Special Account and pay the amount listed in Column B of Appendix F to Plaintiffs. See id. ¶ XX.75. Accordingly, Remaining Plaintiffs have not at this time moved for the dismissal of their claims against the following defendants:

United States Air Force;
United States Information Agency;
United States of America;
The United States Department of Defense;
William S. Cohen,
In His Official Capacity as Secretary of the United States Department of Defense;
The United States Department of the Army; and
Togo D. West, Jr., In His Official Capacity as Secretary of the Army.

Finally, Remaining Plaintiffs are not moving to dismiss their claims against the following parties, with whom the Remaining Plaintiffs have not settled:

⁶Remaining Plaintiffs also move for the dismissal with prejudice of Clermont Waste Collection Inc. Based upon additional information provided during the ADR process, Remaining Plaintiffs do not currently believe that Clermont Waste Collection would be held liable for response costs at the Site, and therefore voluntarily move for the company's dismissal from the case.

FROM

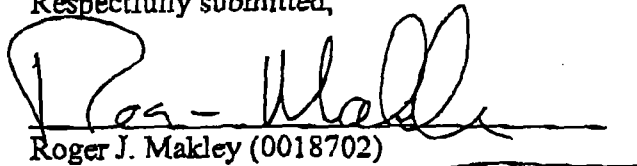
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Acme Wrecking Co., Inc.;
Aeronca, Inc.;
Clarke Container, Inc.;
Clarke Sanitary Landfill;
Dick Clarke Trash Removal and Demolition;
Clarke's Complete Collection;
Clarke's Incinerators, Inc.;
Clarke Services, Inc.;
The David Hirschberg Steel Company;
John F. Bushelman Construction, Inc.;
John J. Whitton Trucking Co.; and
Sealy, Inc.

For the Court's convenience, Plaintiffs have attached to this memorandum a chart setting forth the status of Remaining Plaintiffs' claims against each of the defendants. As noted above, Plaintiffs Morton and PPG have moved for dismissal of all defendants.

Wherefore, Plaintiffs respectfully request that Remaining Plaintiffs' Motion to Dismiss Certain Defendants and Morton's and PPG's Motion to Dismiss and for Withdrawal be granted. As noted above, these dismissals are made without prejudice to the Plaintiffs' right to file in a separate subsequent action claims preserved by the Remedial Action Consent Decree and the Work Group Agreement.

Respectfully submitted,



Roger J. Makley (0018702)

Trial Attorney

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ATTORNEY FOR PLAINTIFFS

FROM

(MON) 7.30' 01 11:08/ST. 11:00/NO. 4261720228 P 12

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Status of Claims

Plaintiffs Seeking Withdrawal

Morton International, Inc.; and
PPG Industries, Inc.

Remaining Plaintiffs

The Dow Chemical Company;
Ford Motor Company;
GE Aircraft Engines; and
Velsicol Chemical Corporation.

Defendant Work Group Members and
Related Parties

Anchor Hocking Corporation;
Canadian OXY Offshore Production
Company;
Chemical Leaman Tank Lines, Inc.;
Columbian Chemicals Company;
Formica Corporation;
General Motors Corporation;
Glenn Springs Holdings, Inc.;
Henkel Corporation;
King Container;
King Container Services, Inc. (King
Container Services Company, Inc.);
King Wrecking;
Millennium Petrochemicals, Inc.;
Monsanto Company;
Newell Co. (aka Newell Rubbermaid, Inc.);
OXY, USA, Inc.; and
Quantum Chemical Corporation, f/k/a
National Distillers & Chemicals Corp.

De Minimis Settling Defendants That Are
Parties To and Have Fulfilled Their
Obligations To Plaintiffs Under the
Remedial Action Consent Decree

American Premier Underwriters, Inc.;
American Standard, Inc.;
The Andrew Jergens Company;
Avon Products, Inc.;
The B.F. Goodrich Company;
Borden, Inc.;
BP America, Inc.;
Browning-Ferris Industries of Ohio, Inc.;
Butler County;
Champion International Corporation;
The Cincinnati Enquirer;
The C.M. Paula Company;
Consolidated Rail Corporation;
Cytec Industries, Inc.;
E.I. DuPont de Nemours and Company;
City of Fairfield;
Georgia-Pacific Corporation;
Village of Glendale;
Globe Valve Company (Division of Gerber
Plumbing Fixtures Corporation);
Hilton Davis Company;
International Paper Corporation aka
Masonite Corporation;
Johnston Coca-Cola Bottling Group, Inc.;
Mecco, Inc.;
City of Montgomery;
MVM, Inc.;
Newberry Construction Company;
The Procter and Gamble Co.;
Queen City Barrel Company;
Ralcorp Holdings, Inc.;
City of Reading;
Rumpke Sanitary Landfill;
Rumpke Waste Collection & Disposal
Systems;
Rumpke Collection & Disposal System;
Shell Chemical Co.;
Shell Oil Co.;
City of Silverton;
Steelcraft Manufacturing Company;
Sun Oil Company d/b/a/ Sunoco Oil
Corporation

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Texaco, Inc.;
Union Carbide Corporation; and
Watsons's/J&J Distributing Co.

De Minimis Settling Defendants That Are
Parties To and Have Fulfilled Their
Obligations Under the Municipal Consent
Decree

City of Blue Ash;
City of Deer Park;
Village of Lincoln Heights;
City of Mason;
City of Madeira;
Municipality of Monroe; and
City of Sharonville.

Settling Owner/Operator of the Site That
Has Fulfilled Her Initial Obligation Under
the Remedial Action Consent Decree

Elsa Skinner-Morgan

Zero Share Defendant

Clermont Waste Collection Inc.

Settling Defendants That Have Not Yet
Fulfilled Their Obligations To Plaintiffs
Under the Remedial Action Consent Decree

United States Air Force;
United States Information Agency;
United States of America;
The United States Department of Defense;
William S. Cohen,
In His Official Capacity as Secretary of the
United States Department of Defense;
The United States Department of the Army;
and
Togo D. West, Jr., In His Official Capacity
as Secretary of the Army.

Non-Settling Defendants

Acme Wrecking Co., Inc.;
Aeronca, Inc.;
Clarke Container, Inc.;
Clarke Sanitary Landfill;
Dick Clarke Trash Removal and
Demolition;
Clarke's Complete Collection;
Clarke's Incinerators, Inc.;
Clarke Services, Inc.;
The David Hirschberg Steel Company;
John F. Bushelman Construction, Inc.;
John J. Whitton Trucking Co.; and
Sealy, Inc.

*Remaining Plaintiffs move for the dismissal of their claims against these parties.

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